

2001

Thinking Globally and Acting Locally: Reflections About the Possible Role of "Globalization" in the Evolution of SEQRA

David L. Markell

Follow this and additional works at: <http://ir.law.fsu.edu/articles>



Part of the [Environmental Law Commons](#)

Recommended Citation

David L. Markell, *Thinking Globally and Acting Locally: Reflections About the Possible Role of "Globalization" in the Evolution of SEQRA*, 65 ALB. L. REV. 461 (2001),
Available at: <http://ir.law.fsu.edu/articles/77>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

HEINONLINE

Citation: 65 Alb. L. Rev. 461 2001-2002



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 18 15:15:14 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0002-4678](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0002-4678)

THINKING GLOBALLY AND ACTING LOCALLY: REFLECTIONS ABOUT THE POSSIBLE IMPACTS OF “GLOBALIZATION” IN THE EVOLUTION OF SEQRA

David L. Markell*

INTRODUCTION

New York’s landmark 1975 “look before you leap” statute, the State Environmental Quality Review Act (SEQRA),¹ the focus of this edition of the *Albany Law Review*,² was a product of the times in which the state considered and, ultimately, enacted SEQRA into law. During the 1970s, concerns in the United States about environmental issues, and about the existing laws’ failure to address these issues adequately, were at an unprecedentedly high level.³ These cultural forces led to the enactment of what one leading environmental casebook has termed the “Federal Regulatory Infrastructure,”⁴ beginning with the signing into law of the federal National Environmental Policy Act (NEPA) on January 1, 1970, and arguably culminating with the enactment of the Comprehensive Environmental Response, Compensation, and

* Professor of Law, Albany Law School. Professor Markell served from 1998-2000 as Director, Submissions on Enforcement Matters, for the North American Commission for Environmental Cooperation (NACEC) Secretariat, while on a leave of absence from Albany Law School. The following individuals kindly reviewed one or more earlier drafts of this article: Greg Block of the NACEC, Professors Rob Glicksman, Dan Tarlock, John Knox, James Gathii, Alex Seita and Philip Weinberg, and Michael Gerrard, Kathleen Martens, and John Hanna. The views expressed here are my own and should not be attributed to the NACEC or any other institution for which I have worked. Any errors are my responsibility.

¹ New York State Environmental Quality Review Act of 1975, ch. 612, 1975 N.Y. Laws 895 (1976) (codified as amended at N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1997)).

² The *Albany Law Review*, recognizing only a short time after SEQRA’s enactment the importance of the Act, dedicated an entire edition in 1982 to a discussion of the implications of SEQRA. That edition has proven to be quite influential amongst scholars and practitioners alike, and remains among the most cited volumes of the *Albany Law Review* to date. See generally 46 ALB. L. REV. *passim* (1982).

³ ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 107-08 (3d ed. 2000) (discussing the evolution of federal environmental law). Some observers question the view that existing laws (including common law causes of action) were inadequate to address the environmental concerns of the time. See, e.g., Jonathan H. Adler, *Let 50 Flowers Bloom: Transforming the States Into Laboratories of Environmental Policy*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 11284, 11299 (Nov. 2001).

⁴ PERCIVAL ET AL., *supra* note 3, at 105-07.

Liability Act (CERCLA) in 1980.⁵ These forces were in evidence in New York State during this period as well; they contributed to the enactment of considerable environmental legislation—including SEQRA, which was enacted right in the middle of this extraordinary decade-long burst of legislative activity.⁶

SEQRA shares its roots with federal environmental legislation in another, more immediate, way as well. SEQRA owes a great deal to its federal counterpart, NEPA, adopted just a few years beforehand, as well as to the laws of other states. As the seminal two-volume treatise on SEQRA, *Environmental Impact Review in New York*, notes, “SEQRA was derived in large measure from . . . [NEPA].”⁷

⁵ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370e (1994 & Supp. IV 1998); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994 & Supp. IV 1998)). The National Environmental Protection Act (NEPA) has been called the “founding statute of the modern era of environmental law.” Robert L. Fischman, *The EPA’s NEPA Duties and Ecosystem Services*, 20 STAN. ENVTL. L.J. 497, 503 (2001).

⁶ SEQRA nevertheless faced considerable opposition from important actors on the New York political scene, including many local governments. See Sandra M. Stevenson, *Early Legislative Attempts at Requiring Environmental Assessments and SEQRA’s Legislative History*, 46 ALB. L. REV. 1114, 1120-23 (1982).

During the 1970s, for example, the State created its Department of Environmental Conservation in 1970, Environmental Conservation Law, ch. 140, 1970 N.Y. Laws 185 (1970) continued by N.Y. ENVTL. CONSERV. L. § 3-0101 (McKinney 1997); adopted a law concerning tidal wetlands in 1973, Tidal Wetland Act, ch. 790, 1973 N.Y. Laws 1482 (1973) (codified as amended at N.Y. ENVTL. CONSERV. L. §§ 25-0101 to 25-0601 (McKinney 1997)); and established the New York Environmental Protection and Spill Compensation Fund (the Oil Spill Fund) in 1977, Oil Spill Prevention, Control and Compensation Act, ch. 845, 1977 N.Y. Laws 1557 (1977) (codified as amended at N.Y. NAV. L. §§ 170-197 (McKinney 1989)). For a helpful chronology of significant developments in New York environmental law, see THE NELSON A. ROCKEFELLER INST. OF GOV’T, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION: A 25TH ANNIVERSARY REVIEW 133-161 (1996).

For several of the major environmental laws, such as the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. V 1999); the Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994 & Supp. IV 1998); and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1994 & Supp. IV 1998), the “cooperative federalism” approach Congress adopted for implementation played a significant role in motivating the state to adopt strengthened environmental laws. In particular, Congress, in making the Environmental Protection Agency (EPA) responsible for implementing these laws but requiring EPA to authorize a state to take over if the state could demonstrate that it was qualified to do so, encouraged many states to strengthen their legislation, among other actions, in order to be able to make this showing. See David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 30-35 (2000).

⁷ 1 MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 1.01 (2001). See Hugh L. Carey, *Memorandum on Approval of the State Environmental Quality Review Act (SEQRA)*, reprinted in 1975 SESSION LAWS OF NEW YORK, at 1761 (describing the need for the legislation and noting its similarity to NEPA). See also Neil Orloff, *SEQRA: New York’s Reformation of NEPA*, 46 ALB. L. REV. 1128, 1130 (1982) (noting that “[t]he broad environmental goals of the two statutes [NEPA and SEQRA] are virtually identical”); Nicholas A. Robinson, *SEQRA’s Siblings: Precedents from Little NEPA’s in the Sister States*, 46 ALB. L. REV. 1155, 1156, 1160-61 (1982) (noting that New York, in enacting SEQRA, was following the lead of Congress in its enactment of NEPA). The New York State legislature

In this article I consider the possibility that SEQRA's *future* is likely to be shaped by developments beyond the borders of New York State, including the phenomenon of "globalization."⁸ I first discuss the possibility that globalization may affect the content of substantive environmental norms in New York, as contained in SEQRA and other domestic environmental laws. I then consider whether the forces of globalization are likely to impact the State's environmental procedures, as contained in SEQRA and other domestic laws. Finally, I discuss why these forces are more likely in the future to influence domestic environmental laws and practices than has occurred to date.

I. STATE SUBSTANTIVE ENVIRONMENTAL REQUIREMENTS

Almost twenty-five years ago, the Supreme Court concluded that the "mandate" of SEQRA's federal counterpart, NEPA, is "essentially procedural."⁹ While many commentators have bemoaned the course that the caselaw has taken¹⁰—the fact remains

"actively considered this corpus of [state and federal] jurisprudence when it shaped SEQRA." *Id.* at 1160. Several other states have also enacted their own environmental review acts—"little NEPAs." *See id.* at 1156-62 (comparing and contrasting New York's SEQRA to its NEPA "siblings" in other states).

⁸ While a variety of definitions have been provided of the term globalization, it clearly includes the emergence of significant numbers of international regimes in recent years, and the extraordinary increase in international trade and investment during this period. Concerning the former, see, for example, Harold K. Jacobson & Edith Brown Weiss, *A Framework for Analysis*, in *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1* (Edith Brown Weiss & Harold K. Jacobson eds., 1998). The authors' note more than a ten-fold increase in the number of international legal instruments that addressed environmental protection between 1972 and 1992. *Id.* *See also* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 489 (2001) (indicating that "by one count the number of intergovernmental organizations (IGOs) and regimes has increased from 123 in 1951 to 251 in 1999 (although the numbers vary according to the different criteria employed)"). Many have touted the creation of a Global Environmental Organization, a World Trade Organization-like organization for the environment. *See, e.g.,* W. Bowman Cutter et al., *New World, New Deal: A Democratic Approach to Globalization*, FOREIGN AFF., Mar./Apr. 2000, at 80, 94-95. The emergence of international institutions whose primary focus is trade but whose impacts extend to environmental issues, such as the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA), obviously are of enormous importance, and have triggered enormous attention, as well. For a review of the reasons for the internationalization of environmental issues, see Robert W. Hahn & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421, 423-27 (1989). Concerning the increase in trade, see HILARY FRENCH, *VANISHING BORDERS: PROTECTING THE PLANET IN THE AGE OF GLOBALIZATION* 5 (2000).

⁹ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

¹⁰ Lynton K. Caldwell, *NEPA Revisited: A Call for a Constitutional Amendment*, ENVTL. F., Nov./Dec. 1989, at 18, 21. For example, Professor Lynton Caldwell has characterized as "crabbed" the interpretation of NEPA that views the statute as "largely rhetorical, imposing no mandate upon the agencies cognizable by the courts." *Id.* *See also* Kathleen A. McGinty, *Introduction to COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE*

that courts routinely apply NEPA to require analysis of environmental impacts. The courts have not insisted that the conclusions of the analysis dictate the outcome of the NEPA process. As the Supreme Court stated in its 1989 decision in *Robertson v. Methow Valley Citizens Council*,¹¹ "it is now well settled that NEPA itself does not mandate particular results."¹²

Some prominent observers have claimed that to some extent SEQRA departs from NEPA on this front, suggesting that SEQRA is not merely a disclosure statute. As one commentator put it, in a phrase cited with approval by the New York Court of Appeals, SEQRA "imposes far more 'action-forcing' or 'substantive' requirements on state and local decisionmakers than NEPA imposes on their federal counterparts."¹³

There is at least the possibility that developments in international law norms may affect the "action-forcing" nature of SEQRA, as it is implemented with other domestic laws. To provide one example, various commentators contend that international environmental law prohibits one country from causing significant environmental harm to another. Indeed, some commentators have characterized this "good neighbor" notion as "the cornerstone of international environmental law."¹⁴ This commitment to "good neighborliness" is embodied in the 1972 Stockholm Declaration as well as the 1992 Rio Declaration, which was signed by many of the countries in the world, including the United States.¹⁵ Principle 21 of the 1972 Stockholm Declaration,¹⁶ for instance, provides as follows:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to

NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS at iii (1997); PERCIVAL ET AL., *supra* note 3, at 891; Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239-40 (1973); James M. McElfish, *Back to the Future*, ENVTL. F. Sept./Oct. 1995, at 14, 14-16.

¹¹ 490 U.S. 332 (1989) (per curiam).

¹² *Id.* at 350. See also *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (citing *Vt. Yankee*, 435 U.S. at 558).

¹³ *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 434 (N.Y. 1986) (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)). See also *Town of Henrietta v. Dep't of Envtl. Conserv.*, 430 N.Y.S.2d 440, 445-47 (App. Div. 1980) (noting that SEQRA "make[s] environmental protection a part of the mandate of every state agency and department").

¹⁴ PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I*, at 186 (1995).

¹⁵ Alan Boule & David Freestone, *Introduction to INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT* 4 & n.13 (Alan Boyle & David Freestone eds., 1999) ("The United States joined in the consensus, but subject to reservations with regard to Principles 3, 7, 12, and 23.").

¹⁶ *Report of the United Nations Conference on the Human Environment, Declaration of Principles*, Session of June 5-16, 1972, Principle 21, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416, 1420 (1972) [hereinafter *Conference on the Human Environment*].

their own environmental policies, *and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*¹⁷

Others suggest that the "obligation" not to cause transboundary harm is more myth than reality. Oscar Schachter's statement captures this perspective: "[t]o say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day."¹⁸ More generally, Professor Thomas Merrill devoted a 1997 law review article to "ask[ing] why regulation of transboundary pollution remains so underdeveloped."¹⁹

The salient point, for our purposes, is that there is a possibility that one feature of globalization will be the increasing development of norms of international law.²⁰ The follow-up question is, what will be the consequences if this growing body of international law diverges from domestic law—e.g., if international law norms move in a direction seemingly favored by Principle 21 of the Stockholm Declaration and Rio Principle 2,²¹ or in a direction that undermines

¹⁷ *Id.* (emphasis added). The oft-cited *Trail Smelter* arbitration is to the same effect. *Trail Smelter Case* (U.S. v. Can.), Arbitral Tribunal, 3 U.N. Rep. Int'l Awards (1941), reprinted in HUNTER, ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 508 (2d ed. 2002).

The U.N. Conference on the Human Environment was held in Stockholm; the Declaration of Principles (including Principle 21) was adopted on June 16, 1972. *Conference on the Human Environment*, *supra* note 16, 11 I.L.M. at 1416. Twenty years later, in 1992, 176 nations of the world, including the United States, reaffirmed this principle in Principle 2 of the Rio Declaration. *Rio Declaration on Environment and Development*, U.N. CED, Session of June 3-14, 1992, Principle 2, Agenda Item 9, at 1, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 876, 876 (1992). See also SANDS, *supra* note 14 at 50 (describing the *Rio Declaration* as the result of "a negotiation . . . adopted by consensus of 176 states").

¹⁸ Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457, 463 (1991).

¹⁹ Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 934 (1997). See also *id.* at 958-961 (discussing adjudications involving transboundary pollution).

²⁰ See, e.g., Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 322 (2001) (noting that "the demand for international law has increased with the rise of economic globalization and transnational nongovernmental organizations ("NGOs")").

This article is not the place for an extensive analysis of the substance of international law, including whether the notion of "good neighborliness" as embodied in the Rio and Stockholm Declarations and in the *Trail Smelter* arbitration is part of the body of such law. The author's co-editor on an ongoing book project provides a more in-depth discussion of this issue in a forthcoming article. See John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 97 AM. J. INT'L L. (forthcoming 2002) (on file with Albany Law Review).

²¹ It is by no means clear that the Rio Declaration was intended to create any sort of absolute prohibition on harm to other countries—especially given the Rio Declaration's overarching theme of sustainable development, which contemplates a balancing of environmental, economic, and other issues. See SANDS, *supra* note 14, at 49-50 (describing the Rio Convention as "a balance between the objectives of environmental protection and economic development," and noting that the Declaration "provides a basis for defining

domestic environmental norms, as many are concerned some of the trade regimes do?²²

At least three consequences seem plausible. First, it is possible that domestic laws such as SEQRA and other state laws that apply to proposed projects will continue to prevail. International norms will carry little if any weight. In this case, development of such norms is likely to have minimal affect on the future shape of SEQRA and other domestic environmental laws.

A second possibility is that there will be movement to harmonize domestic laws with international principles. Interest in pursuing such harmonization exists in many quarters. As one commentator puts it:

Globalization has increased the degree and intensity of international economic exchange by several orders of magnitude. With this comes a demand for rules to govern these exchanges. This includes . . . a desire by actors to harmonize different national regulatory schemes.²³

Movement in this direction may create pressure to conform the standards embodied in SEQRA and other domestic environmental laws to the expectations established under international law.

A third, not unrelated, option is that parallel processes will be created. For example, for projects that may have significant adverse transboundary impacts, or that have trade-related consequences covered by one or more international trade regimes, SEQRA and other domestic environmental laws may not necessarily be determinative. Instead, alternative or parallel processes may be created to consider such projects, or perhaps the extent to which the government's action in connection with such projects conforms to international law. The latter has already happened to some extent under the international trade regimes. Chapter 11 of the North

'sustainable development'). Prioritizing environmental issues over others would seem to be at least potentially conceptually inconsistent with such an approach. *But c.f., id.* at 50 (offering the possibility that "[t]he introduction of [the language reflecting the emphasis on developmental issues] may even expand the scope of responsibility not to cause environmental damage to apply to national development policies as well as national environmental policies"). One treatise characterizes the Rio Declaration as "giv[ing] hortatory voice to what nations should strive for in achieving sustainable development . . . [without discussing] how nations can go about achieving these goals." See 6 FRANK P. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 13.03[7][c][ii] (1995).

²² See, e.g., David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 653-54 (2001). In addition to their possible impact on SEQRA, international norms obviously have the potential to affect domestic norms under other environmental laws. As the text makes clear, for purposes of this article I am considering SEQRA in tandem with other domestic laws that contain environmental norms.

²³ Drezner, *supra* note 20, at 322 (2001).

American Free Trade Agreement (NAFTA), allows an investor to bring a case before a tribunal appointed under that Chapter, alleging that a country or "subfederal" government has taken action that, *inter alia*, violates a NAFTA norm.²⁴ An interesting example is the Methanex NAFTA Chapter 11 filing. Methanex, a Canadian corporation and the world's "largest producer and marketer of methanol, the principal ingredient of [methyl tertiary butyl ether] MTBE,"²⁵ brought an action under Chapter 11 against the United States and California. Methanex alleged that a California Executive Order that required the removal of MTBE, a gasoline additive, because of concerns about MTBE pollution, violated NAFTA because the Order was, *inter alia*, "tantamount to expropriation."²⁶ Methanex sought damages of \$970,000,000. Thus, the existence of an international forum, available to hear challenges to domestic environmental actions on the ground that they are inconsistent with international norms, may raise issues concerning the sustainability of decisions made under domestic laws, and even the possibility of sanctions potentially to be imposed on regulators who apply their domestic laws to produce results deemed inconsistent with international law.²⁷

²⁴ North American Free Trade Agreement, Dec. 8-17, 1992, U.S.-Can.-Mex., ch. 11, 32 I.L.M. 605, 639 (1992) [hereinafter NAFTA Agreement]. See, e.g., Gantz, *supra* note 23, at 653 (noting that NAFTA Chapter 11 is "currently receiving considerable attention" because of the "possible conflict between the protections afforded to foreign investors against expropriation, or discriminatory or inequitable treatment, and the ability of national and state or provincial governments to continue to impose otherwise valid regulatory requirements, particularly regulations intended to protect the environment"). Professor Gantz notes that the standards under NAFTA continue to evolve, stating that "[w]hen and whether . . . environmental regulations constitute compensable takings under NAFTA, or may require compensation under Chapter 11's non-discrimination or 'fair and equitable treatment' provisions, is a critical legal and policy issue." *Id.* at 656 (emphasis deleted).

²⁵ Gantz, *supra* note 22, at 662. Professor Gantz provides a more detailed summary of the Methanex claim in his article. *Id.* at 659-665.

²⁶ *Id.*

²⁷ See Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 198 (2001) (noting that NAFTA Chapter 11 "recognizes the possibility that governments may be responsible for regulatory actions that destroy or severely damage the value of a property right"); Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 227 (2001) (noting that NAFTA Chapter 11, for example, creates the possibility of sanctions against the government if it is found, by an international tribunal, to have violated the terms of that Agreement (e.g., engaging in an illegal expropriation)); J. Carol Williams, *The Next Frontier: Environmental Law in a Trade-Dominated World*, 20 VA. ENVTL. L.J. 221, 225 (2001) ("The damages sought in these NAFTA Chapter 11 disputes are large and the stakes are high in this new international frontier. The threat that legitimate environmental regulations could be found to violate NAFTA means that there is also a risk of an enormous internationally imposed price tag for enacting and maintaining domestic legislation to protect the environment.").

In the NAFTA Chapter 11 context, many of these decisions will be made by international arbitral panels, applying NAFTA and "applicable rules of international law." Gantz, *supra* note 22, at 670, 683-84 (noting that "[d]isputes under Chapter 11 are to be decided 'in

The emergence of international environmental norms with "bite," in short, creates the possibility that these international norms may affect SEQRA's content or the legitimacy of actions taken under it and other domestic laws, and even the public fisc.

II. STATE ENVIRONMENTAL PROCEDURES

A second type of "pressure" may come on the "process" end of SEQRA. The notion that it is important to "look before you leap"—through advance consideration of the environmental impacts of proposed projects—has found fertile soil in which to spread globally, as well as within the United States.²⁸ Increasingly, there is interest in ensuring that there are processes in place that will allow consideration of, and attention to, activities that may cause significant transboundary and other environmental impacts that extend beyond the jurisdiction of the source country.²⁹

This is certainly true with respect to pollution in North America. The three North American countries, the United States, Canada, and Mexico, have explicitly acknowledged that pollution does not stop at national or other political boundaries,³⁰ and have committed to work together to address transboundary impacts.³¹ For example, in section 10(7) of the North American Agreement on Environ-

accordance with this Agreement [NAFTA] and applicable rules of international law" and that the claims are decided through arbitration, with limited review by national courts available in some instances) (quoting NAFTA Agreement, art. 1131, *supra* note 24, 32 I.L.M. at 645).

²⁸ "More than eighty-five countries have adopted NEPA in nearly its totality as the foundation of their own environmental laws." Margaret A. Shannon, *Will NEPA Be "an Agenda for the Future" or Will It Become "a Requiem for the Past"?*, 8 BUFF. ENVTL. L.J. 143, 155-56 (2000) (reviewing LYNTON K. CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE* (1998)).

²⁹ For example, some of the Organization for Economic Cooperation and Development's (OECD) recommendations were adopted in *Convention on Environmental Impact in a Transboundary Context* at Espoo, Finland. *Convention on Environmental Impact in a Transboundary Context*, Feb. 25, 1991, 30 I.L.M. 800 (1991) [hereinafter *Convention on Environmental Impact*] (recommending environmental impact statements prior to approving certain activities). In addition to concerns about transboundary harm associated with consideration and approval under SEQRA and other domestic laws of projects located in New York, there also are concerns about harm to "commons" areas. See Merrill, *supra* note 19, at 970. Many of the references in this article to concerns about transboundary harm may apply with equal force to concerns about harm to global commons, and other impacts that transcend national boundaries.

³⁰ For a general discussion of the phenomenon of transboundary pollution, see Merrill, *supra* note 19, at 931-967.

³¹ The focus in the text on North America is deliberate, since many of the activities considered under SEQRA are likely to impact other countries in North America, if they have any transboundary impact. But the reader also should be aware that interest in processes to consider and address transboundary and other impacts that extend beyond a country's borders is by no means confined to North America and, consequently, the implications for SEQRA at least potentially extend beyond continental boundaries. See, e.g., *Convention on Environmental Impact*, *supra* note 29.

mental Cooperation (NAAEC)³²—sometimes known as the environmental side-agreement to NAFTA—the United States, together with Canada and Mexico, recognize the significance of transboundary pollution on the North American continent and commit to investigate and develop recommendations for how best to coordinate in assessing the potential for such pollution and mitigating its adverse effects:

Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, with a view to agreement between the Parties . . . within three years . . . consider and develop recommendations with respect to:

- a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;
- b) notification, provision of relevant information and consultation between Parties with respect to such projects; and
- c) mitigation of the potential adverse effects of such projects.³³

³² North American Agreement on Environmental Cooperation, Sept. 8-14 1993, U.S.-Can.-Mex., art. 10(7), 32 I.L.M. 1484, 1486-487 (1993) (effective Jan. 1, 1994) [hereinafter NAAEC Agreement].

³³ *Id.*

The United States has made numerous efforts to coordinate with its neighbors on environmental issues in addition to its relatively recent work under the North America Agreement on Environmental Cooperation [NAAEC]. The Boundary Waters Treaty of 1909 is an early example of U.S. efforts to cooperate with Canada. Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448. The Great Lakes Water Quality Agreement of 1978, as amended, is another prominent example of such cooperation. Boundary Waters Treaty, *opened for signature*, Aug. 23, 1978, U.S.-Can., T.I.A.S. No. 9445, at 4032; Agreement Governing the Operation of Pilotage Services Amending the Memorandum of Arrangements to the Agreement of August 23, 1978 and March 29, 1979, U.S.-Can., Feb. 12, 1991, T.I.A.S. No. 11,813; Agreement Governing the Operation of Pilotage Services Amending the Memorandum of Arrangements to the Agreement of August 23, 1978 and March 29, 1979, U.S.-Can., Oct. 15, 1992- June 17, 1993, T.I.A.S. No. 12,154. A third, recent example is the 1991 Agreement between the United States of America and Canada on Air Quality, as amended in 2000. Agreement on Air Quality, March 13, 1991, U.S.-Can., T.I.A.S. No. 11,783; Protocol Amending the "Agreement Between the Government of Canada and the Government of the United States of America on Air Quality", Dec. 7, 2000, U.S.-Can., Hein's No. KAV 5863, *available at* www.ec.gc.ca/air/pdfs/can_usa_e.pdf. This Agreement commits the countries to notify each party in advance of various activities that might cause air pollution problems in the other, undertake environmental impact assessment, and pursue mitigation measures, among other things. Agreement on Air Quality, art. III, *supra*, T.I.A.S. No. 11,783. Similar agreements have been negotiated between Mexico and the United States. *See, e.g.*, Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 1993, U.S.-Mex., 32 I.L.M. 1545, 1548,

Following the countries' creation of the NAAEC in 1994, in 1995 the North American Commission on Environmental Cooperation [NACEC] Council, created by the NAAEC and comprised of the EPA Administrator and her Canadian and Mexican counterparts, issued a Resolution that contains a series of "overarching principles" concerning transboundary impact assessment.³⁴ The first such principle the Administrator and her counterparts listed is that "pollution does not respect borders."³⁵ They affirmed their commitment to "good neighborliness," which they indicated includes a willingness to coordinate in various ways in connection with proposed projects in one country that could cause environmental harm in another:

Good neighborliness is a willingness to cooperate with neighboring States to seek to inform a potentially affected State of relevant data and a willingness to take appropriate steps to address the legitimate concerns of those potentially impacted by the activities in another State.

Good neighborliness provides a potentially affected State with the opportunity to contribute comments and information to the environmental assessment process.³⁶

1556 (1993).

³⁴ North Am. Comm'n for Env'tl. Cooperation, Council Res. 95-7, (Oct. 13, 1995), at <http://www.cec.org>.

³⁵ *Id.*

³⁶ *Id.* Various U.S. federal environmental laws require consideration of, and/or attention to, transboundary impacts as well, though actual progress on this front has been met with considerable skepticism. See, e.g., Clean Air Act, § 115, 42 U.S.C. 7415 (1994). See Merrill, *supra* note 19, at 933-34.

The U.S. Council on Environmental Quality (CEQ) has taken steps to encourage consideration of transboundary impacts for projects subject to the jurisdiction of federal agencies. See, e.g., COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, GUIDANCE ON NEPA ANALYSES FOR TRANSBOUNDARY IMPACTS (1997), www.ceq.eh.doe.gov/nepa/regs/transguide.html (stating that "CEQ has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States"). There is some question as to whether the CEQ has the authority to make such a decision on its own. See Knox, *supra* note 20 (manuscript at 18 n.52, on file with Albany Law Review). Compare 4 SECRETARIAT OF THE COMM'N FOR ENVTL. COOPERATION, *Access to Courts and Administrative Agencies in Transboundary Pollution Matters*, in NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY 274 (2000) (suggesting that the CEQ has this authority) [hereinafter COMM'N FOR ENVTL. COOPERATION] with DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 5.04 (2d ed. 2000) (suggesting that the issue remains unsettled and noting the absence of any express indication as to whether NEPA applies extraterritorially, and further commenting that the legislative history sheds no light on the issue).

The notion of considering transboundary impacts obviously has a considerable amount in common with the idea of addressing interstate impacts. There is a long common law history of treatment of such impacts. See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 209-09, 247-48 (1901) (involving a request for an injunction that would prevent the discharge of sewage into the Mississippi River). Interstate pollution also has been addressed in a number of environmental statutes. See, e.g., Clean Air Act, § 505(a)(2), 42 U.S.C. § 7661d(a)(2) (1994)

The issue in the process context, therefore, concerns the existence of a possible divide (real and/or perceived) between the process provided under SEQRA, as it is implemented with other domestic laws, and the types of processes that may be desired and/or required under international law. The NACEC has identified four types of process-related issues concerning projects that may have transboundary impacts: (1) notification of affected country(ies),³⁷ (2) assessment of potential impacts,³⁸ (3) determination of appropriate steps to mitigate such impacts,³⁹ and (4) dispute resolution.⁴⁰ An in-depth review of the extent to which SEQRA, as applied with various domestic environmental laws, addresses these concerns is for another day. The treatise, *Environmental Impact Review in New York*, however, suggests several areas for future review and consideration. It suggests, for example, that SEQRA's provisions "have been interpreted as geographically limiting SEQRA's applicability to protecting New York State's environment."⁴¹ It also notes that some courts have held that "the citizen[s] of an adjacent state lack[] standing to assert a violation of SEQRA's procedures for an agency's failure to address out-of-state impacts resulting from an action within New York's borders."⁴² The treatise indicates that "[t]he rationale was that the legislative findings in the SEQRA statute speak of affording protection for the 'people of the state.'"⁴³ In *The Society of the Plastics Industry, Inc. v. County of Suffolk*,⁴⁴ the Court of Appeals described the limits of standing under SEQRA

(requiring that any state which may be affected by a contiguous state's air quality plan be notified and allowed to submit recommendations on the plan); and Clean Air Act, § 110, 42 U.S.C. 7410(a)(2)(D)(i) (1994) (requiring each state to adopt and submit a plan that contains adequate provisions prohibiting any state from emitting air pollutants which will "contribute significantly to non attainment in, or interfere with maintenance by, any other State with respect to any such national . . . [or] air quality standard[s]"). The underlying goal of addressing "spillovers" has received considerable attention in the scholarly literature. See, e.g., Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2347-74 (1996).

³⁷ 4 COMM'N FOR ENVTL. COOPERATION, *supra* note 36, at 19-26.

³⁸ *Id.* at 4, 30-33 (suggesting that a country should, in assessing potential significant, adverse transboundary impacts, ensure that the affected country and its public have a "meaningful opportunity to participate in the assessment process").

³⁹ *Id.* at 5, 38-40 (suggesting that "[i]n deciding which, if any, mitigation measures to adopt, the Party [country] of Origin should consider relevant comments provided on the matter by the Potentially Affected Parties [countries] or their public").

⁴⁰ *Id.* at 5, 40-42. See also North Am. Comm'n for Env'tl. Cooperation, Council Res. 97-5, (June 12, 1997), at <http://www.cec.org>; NAAEC Agreement, *supra* note 32 at 1490-94.

⁴¹ 1 GERRARD ET AL., *supra* note 7, § 2.05(4).

⁴² *Id.*

⁴³ 2 GERRARD ET AL., *supra* note 7, § 7.07[2][a] & n.25 (quoting N.Y. ENVTL. CONS. L. § 8-0103(3), (5) (McKinney 1997)). As *Environmental Impact Review* notes, judicial opinion on this issue is not uniform. See *id.* at § 7.07[2][a] & n.24 (citing *Steele v. Town of Salem Planning Bd.*, 606 N.Y.S.2d 810 (App. Div. 1994)).

⁴⁴ 573 N.E.2d 1034 (N.Y. 1991).

as follows: "Clearly, the zone of interests, or concerns, of SEQRA encompasses the impact of agency action on the relationship between the citizens of this State and their environment. Only those who can demonstrate legally cognizable injury to that relationship can challenge administration action under SEQRA."⁴⁵

The key point is that, to the extent a divide exists (or is perceived to exist) between the aspirations of international or national officials, non-governmental organizations (NGOs), or others for considering and addressing transboundary and other environmental impacts that extend beyond the State's borders, and the reality produced by the application of SEQRA and other domestic laws, such a divide may put pressure on the domestic assessment process, including implementation of SEQRA, thus requiring a revisiting of the procedures for activities that may cause such impacts.⁴⁶

III. WHY INTERNATIONAL PRESSURES ON DOMESTIC ENVIRONMENTAL LAWS SUCH AS SEQRA ARE LIKELY TO INCREASE

The final question that I address in this article involves the issue of why the pressures mentioned above are likely to have more impact in the future on the substance and process of New York environmental law, including implementation of SEQRA, than they have in the past. In my view, in addition to the increasing content of international law (*e.g.*, international adoption of environmental agreements such as the Basel Convention and creation and application of NAFTA and other trade regimes), the emergence of institutions whose focus extends beyond national borders and advances in technology are two features of globalization that are likely to increase pressures on domestic processes and institutions.⁴⁷

⁴⁵ *Id.* at 1043.

⁴⁶ A May 1993 agreement between New York State and the Province of Quebec is an example of the creation of a process to promote the exchange of information between the two jurisdictions. Memorandum of Understanding on Environment Cooperation, May 10, 1993, N.Y.-Que. (on file with Albany Law Review). Section 5 of the agreement provides that:

The Parties further agree to give prior notice and to consult one another before any major action or project in area under their respective jurisdictions which, if carried out, would be likely to adversely affect the environmental quality of the other Party's territory; appropriate mitigation measures, in particular, must be indicated.

Id.

Several other institutional arrangements to foster coordination exist as well, such as the Lake Champlain Basin effort, involving New York, Vermont, and Quebec. Telephone Interview with Stuart Buchanan, DEC Region 5 Regional Director (January 24, 2002).

⁴⁷ Others features of globalization are likely to contribute to such increased pressures as well. I highlight the two features referenced in the text in an effort to make the larger point that in the future globalization is likely to have more of an influence on domestic environmental governance than it has to date.

A regional institution that is referred to above, the NACEC, is a case in point. As noted above, the NACEC is an institution that views environmental issues through a North American lens. A few years ago, the NACEC commissioned a study of the continental transport and deposition of dioxins—in particular, the sources of dioxins discovered in the new Canadian polar territory of Nunavut. According to the study's authors, the results demonstrate that it is possible to track over long distances pollution from its point of origin to where it lands—in that case, from sources of dioxins in Canada, the United States, and Mexico, to the deposition of dioxins in the Arctic Circle.⁴⁸

The emergence of regional or global institutions like the NACEC may well lead to increased interest in understanding environmental concerns from a continental or global perspective. Further, advances in technological capacity are likely to give such institutions, among others, the ability to identify such impacts, and their sources, to a greater degree than used to be the case. In some cases, technological developments may even facilitate fingerprinting of the sources of transboundary or other impacts. Thus, the confluence of these two features of globalization—increasing numbers of international institutions and improving technological capacity—is likely to spur more frequent calls for assessments of transboundary and other impacts, and for inclusion of the impacted parties (regardless of their citizenry) in the process that determines whether such projects can proceed, and the types of mitigation that are appropriate.⁴⁹

⁴⁸ COMMONER ET AL., CTR. FOR THE BIOLOGY OF NATURAL SYS., QUEENS COLLEGE, CITY UNIV. OF N.Y., LONG-RANGE AIR TRANSPORT OF DIOXIN FROM NORTH AMERICAN SOURCES TO ECOLOGICALLY VULNERABLE RECEPTORS IN NUNAVUT, ARCTIC CANADA 76-77 (2000), http://www.cec.org/files/PDF/POLLUTANTS/dioxrep_EN.pdf.

The study was by no means accepted by all concerned. The NACEC web site contains correspondence that challenges the credibility of the study on several grounds. See, e.g., Letter from J. David Moniot, General Manager, U.S. Steel, to Sarah Rang, Environmental Economics International (Oct. 26, 2000) at http://www.cec.org//programs_projects/pollutants_health/312/comments.cfm; Letter from Joseph C. Wesselman, Corporate Environmental Director, IPSCO Enterprises, to Janine Ferretti, Executive Director, NACEC (Nov. 8, 2000) at http://www.cec.org/programs_projects/pollutants_health/312/comments.cfm.

This article does not take a position on the quality of the study; instead, my point is that as methodologies that offer promise for tracking pollutants develop, they are likely to be used, and they are likely to produce links, however much they are qualified, between sources and impacted areas.

⁴⁹ This is an example of the interplay between technological advances and governance. See Merrill, *supra* note 19, at 960.

CONCLUSION

SEQRA's creation in 1975 owed much to developments outside New York State. During the intervening quarter-century, New York's courts, together with state and local agencies, have been the major actors in shaping the statute, primarily in the context of localized battles over one type of project or another.⁵⁰ In this article I suggest that, increasingly, there is likely to be a shift in the actors that influence the content of SEQRA and other New York environmental laws. More precisely, the universe of such actors is likely to expand. The institutions and mechanisms of international law (such as the NACEC and the NAFTA Chapter 11 process), as well as global "civil society," are likely to have expanding roles in shaping the domestic environmental law landscape. Those interested in influencing and/or anticipating the future of environmental law in New York State need to be aware of the existence of these forces, and of their possible role in the future evolution of New York environmental law.⁵¹

⁵⁰ See, e.g., Michael B. Gerrard & Monica Jahan Bose, *Possible Ways to 'Reform' SEQRA*, N.Y. L.J. Jan. 23, 1998, at 3 ("Tens of thousands of entities are eligible to be lead agency [the agency on a given project that runs the SEQRA process]—not only major state agencies but also city, town, and village legislatures, planning boards, zoning boards, and wetlands commissions; special-purpose state-created entities such as county solid waste authorities; and many others").

⁵¹ The impact of international law on domestic law is a national phenomenon that is by no means limited to New York. See, e.g., Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 92 (2001) (noting that "[a] third noteworthy feature of the past third decade and the new millennium concerns the increasing influence of international law on domestic environmental law . . . U.S. domestic environmental law finds itself beginning to be molded by these broader international forces. . .").